JD–123–97
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INFINITY BROADCASTING CORPORATION
OF ILLINOIS d/b/a WJJD

and Case 13–CA–34583

JACK MILLER, An Individual

Howard Malkin Esq., for
the General Counsel.
Mark W. Engstrom Esq., of
New York, N Y for the Respondent.
Mr. Jack Miller for himself.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Chicago, Illinois, on May 15, 1997. The charge was filed September 12, 1996,[1] and the complaint was issued February 6, 1997. The complaint alleges that Infinity Broadcasting Corporation of Illinois d/b/a WJJD (Respondent) discharged Jack Miller (Miller) on July 26 and refused thereafter to reinstate him in violation of Section 8(a)(3) and (1) of the Act. Respondent filed a timely answer which admitted the allegations of the complaint concerning the filing and service of the charge, jurisdiction, labor organization status, and agency. It denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent,[2] I make the following

Findings of Fact

I. Jurisdiction

Respondent, a corporation, operates a radio station at its facility in Chicago, Illinois, where it advertises goods sold nationally and subscribes to national wire services and annually derives gross revenues in excess of $1 million; it also purchases supplies and materials valued in excess of $5000 from enterprises which themselves are engaged in commerce. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the American Federation of Television and Radio Artists (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 1996 unless otherwise indicated.

[2] Respondent's and the General Counsel's unopposed motions to correct transcript are granted.

II. Alleged Unfair Labor Practices

A. Overview

The issue in this case is whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging Miller from the position he held with radio station WJJD on July 26. Respondent denies that allegation; it asserts, in general, that the radio program that Miller was employed on ceased to exist, that Respondent decided to change its format from primarily a talk radio station to a primarily music radio station, and that it awarded the work on the newly formatted station to individuals who expressed an interest in performing the work.

Respondent actually owned and operated two radio stations; WJJD was its AM station and WJMK was its FM station. Station WJMK is an "oldies" radio station that plays music from the 60s. Station WJJD, the station directly involved in this proceeding, was a "talk" radio station that broadcast locally produced and nationally syndicated radio talk shows. On July 26, station WJJD switched to a mostly music format. In February 1997, station WJJD began simulcast broadcasting with station WJMK; for a 6-week period it broadcast "oldies." Then, for a period of about 3 weeks it broadcast "motivational" programs after which time another radio station picked up the programming on the radio frequency formerly used by station WJJD and station WJJD ceased to exist. Stations WJJD and WJMK shared the same facility, management, and employees.[3] Respondent's general manager was Harvey Pearlman, the program manager was Kevin Robinson, and the operations manager was Rick Patton. Respondent has recognized the Union as the collective-bargaining representative for certain of its employees who perform "on air" work.

B. Miller's Work History

Miller began working for Respondent in 1986, and he has worked on both radio stations. He has held a number of positions with station WJJD, including announcer and board operator. Miller has also worked as a disc jockey for both station WJJD and station WJMK and worked as music director for station WJJD. A board operator coordinates the various audio sources for the broadcast, such as commercials, music, and telephone calls. This is done by operating control boards. An announcer talks "on air." A "combo" board operator is a board operator who also does occasional "on air" work such as announcing the weather. The "on air" work performed by Miller was covered by the contract between the Union and Respondent. When he worked as music director, Miller scheduled the music and music programming. In 1991, Miller was released from his position as music director as a result of cost cutting; he received a severance and vacation pay package. As of the date of the hearing, Miller was still working 1 day a week as a part-time disc jockey for station WJMK. He also performed some tape promotion and board operator work for that station.

In November 1993, Miller was performing board operator work at remote sites.[4] This work was then covered by the collective-bargaining agreement between Respondent and the Union, and Miller was paid about $170 or $180 for a 4-5-hour shift, or about $35 per hour. At that time Miller was advised that Respondent had decided that that type of board operator work

[3] Despite these facts the General Counsel has not moved to amend the complaint to more accurately name the Respondent.

[4] Remote sites broadcasts are broadcasts which originate from locations outside the radio station studio. During such remote broadcasts, Miller performed the board operator work from the studio even though the announcer might be located at the remote site.

was not covered by the contract with the Union, and Miller's pay was reduced to about $10 per hour and his contractual benefits were also reduced. Miller contacted the Union and then filed a grievance. An arbitration hearing was held May 6, 1994, at which Miller, Pearlman, and Robinson appeared. The issue decided by the arbitrator was whether "combo" board operator work performed by Miller had to be compensated at the contractual rate. On July 7, 1994, the arbitrator issued his decision sustaining the grievance filed and requiring that Miller be made whole at the rate specified the contract. Miller, thereafter, received about $8000 or $9000 in backpay from Respondent.[5]

Meanwhile, on June 10, 1994, Miller had a conversation with Pearlman and Robinson at work. Pearlman said that he was the director and he would have nothing to do the f- -king unions. Miller replied that he did not know what Pearlman was talking about. Pearlman said that he had heard that there was a plan involving the Union and that Miller was behind it. Miller denied this. Pearlman said that Miller was undermining the station by his union activities, "by arranging something behind their back." Pearlman mentioned Patton's name, who apparently was involved in an arbitration, and again asked Miller "what the f- -k" he was doing. Miller again answered that he did not know what Pearlman was talking about. Pearlman then asked why Miller did not just take his severance pay and leave Respondent. At that point Robinson, who had been silent, said that the conversation should end. After Pearlman left Robinson told Miller that he "guessed" Respondent would have to look into it. Later that day Miller reported the incident to Union Official Catherine Struzynski. She told Miller that "of course" he knew nothing of the matter that Pearlman was referring to because Miller was not involved in that matter; she explained to Miller what the situation was between Respondent and the Union.[6]

On August 4, 1994, Robinson issued a memorandum instructing Respondent's staff that henceforth all remote site broadcast board operators would perform only board operator duties and that under no circumstances would board operators act as stand by announcers, make any station announcements or perform any on-air services. The effect of the memo was to undercut the rationale used by the arbitrator in sustaining Miller's grievance. That same day Miller also received a memorandum from Robinson. The first paragraph was identical to the memorandum issued to the staff; it continued by informing Miller that he had the option to remain a remote site broadcast board operator, but with the understanding that he would not be required or allowed to make station announcements or fill in for the remote site announcer while working as a board operator. Miller's hourly pay would then be $10 per hour.[7] At the time Miller received this memo he was working as a part-time board operator for both stations WJJD and WJMK, and he was also working as a weekend announcer for station WJMK. Miller testified that the memorandum did not significantly impact his work since it was not strictly enforced, but the record is not entirely clear on this point.

---

[5] The General Counsel's motion to correct transcript corrects the transcript concerning this amount.

[6] These facts are based on the testimony of Miller whom I conclude is a credible witness. Robinson admitted that a heated conversation took place on this date, but that he did not recall many significant parts of the conversation. I conclude Miller's recollection of the conversation is better than Robinson's. I have also considered Pearlman's testimony regarding this incident. In general, I did not find him to be a particularly credible witness and his testimony concerning this incident was unpersuasive. Except where specifically stated, I do not credit Pearlman's testimony.

[7] In its brief Respondent admits that these instructions were an effort to reduce the unanticipated costs resulting from the arbitration award.

In November 1994, Respondent announced that it was becoming a “talk show” radio station. At that time Miller was working as a staff announcer/board operator on the "G. Gordon Liddy Show," a talk program. A new program, the "Ed and Ty Show," was added to station WJJD. This was a live show featuring Edward Vrdolyak[8]and Ty Wansly. This show was somewhat unique in that it was Respondent’s only locally produced program that ran 5 days a week and required a board operator. The program was structured so that guests could be interviewed live from the radio studio and telephone calls could be taken from the public during the broadcast. This required the work of a board operator with a significant level of expertise. After Vrdoyak expressed dissatisfaction with the work of the person who initially was assigned to do the board operator work, Respondent selected Miller to be the board operator for this show. As such, Miller coordinated telephone calls, commercials, the two announcers and the news announcer. Miller did not receive the contractual pay rate or benefits for this work since it did not involve “on air” work, however he was paid at the rate of $20 per hour instead of the regular $10 per hour rate and he did work more hours per week as a result of this assignment. The "Ed and Ty Show" ran from 5:30 to 10 a.m.; the "G. Gordon Liddy Show" ran from 10 to 2 p.m., both Monday through Friday. Miller also performed duties as a disc jockey and part-time board operator for station WJMK. For some of this work Miller was compensated under the union contract while for other work he received pay and benefits that Respondent provided to its nonunion employees.

In January 1995, Miller spoke with Rick Patton in an effort to bring some uniformity to his method of compensation. Miller proposed that he keep his current wage rates, but that he receive benefits according to the union contract. This meant that Miller would be receiving less time off but he would receive the union contractual benefits. Patton replied that this was a matter that he could not handle, that it would have to go to Pearlman, and that “Mr. Pearlman is not in the mood to hear about you or unions at this point.”[9]

In late spring or early summer of 1995, Miller found that doing both the "G. Gordon Liddy Show" and the "Ed and Ty Show" was too difficult, so, with Patton’s agreement, he gave up working on the Liddy show. However, Robinson offered Miller some work programming a sophisticated telephone computer system that Respondent had just installed; this assignment lasted 6 months. In late summer or early fall of 1995 Miller attempted to speak with Pearlman directly on several occasions about his pay and benefits, however, Pearlman refused to take the calls or make himself available for a meeting. This was despite the fact that Pearlman admitted that he normally has an “open door” policy regarding employees. This led Miller to ask assistance from Vrdolyak to arrange a meeting between Miller and Pearlman. When Vrdolyak told Miller that he had done so, Miller called Pearlman at once. This was in March or April. Pearlman asked what the call was about, and Miller replied, “[A] few things.” Pearlman said “Is it any more of this f- -kinging union stuff?’ Miller answered that it was about pay and benefits. Pearlman then said, “It’s a dead f- -king issue” and he hung up the phone.[10] Miller reported

[8] Vrdolyak is a former 10th ward alderman and mayoral candidate for the city of Chicago.

[9] This testimony is unrebutted; Patton, who no longer works for Respondent, did not testify at the hearing. While Pearlman denied that he ever told Patton anything to that effect, this does not serve to rebut the evidence that Patton accurately portrayed Pearlmen’s sentiment towards Miller and unions.

[10] This again is based on the testimony of Miller. Respondent argues that Miller’s testimony should be discredited since, in a document that accompanied the charge in this case which described this conversation Miller made no reference to Pearlman’s statement, “is it any more of this f- -kinging union stuff.” However, in the affidavit Miller provided to the Board shortly thereafter during the investigation of the charge, the statement was included. Thus, the

Continued

these events to his union representative.[11]

The contract between the Respondent and the Union expired around March. As a result of the new contract, a new, lower rate was implemented for "combo" board operators. These operators were offered a buyout instead of taking a reduction in pay. About four of Respondent's board operators accepted the buyout offer and resigned. In May, Respondent began advertising for new operators and beginning in June Respondent hired about eight new board operators or "combo" board operators.[12]

C. Miller's Termination

Meanwhile, during the first week in July, Vrdolyak decided to cancel his part in the "Ed and Ty Show"; this resulted in the termination of that program. By that time the show had moved to a broadcast time of from 2 to 6 p.m. On July 26, Miller had a meeting with Patton, Robinson, and Barack Ecoles, producer of the "Ed and Ty Show." Robinson told Miller and Ecoles that Ed Vrdolyak had exercised his contractual option to discontinue the show and that Respondent decided to accept that. Robinson said, "Ed [Vrydolyak] quit for you." Robinson then said that Miller and Ecoles no longer worked for the Respondent; he asked Miller if Miller would work that day and run a "best of" tape of the show and Miller agreed. Miller was handed a check for severance pay. Robinson specified that it was for station WJJD and that Miller's work with station WJMK would continue. Miller asked who was going to take his job; Robinson replied that it was all taken care of; the schedule was made out. During this meeting Miller asked what the new format would be and if he could be used; he received no response. The two producers of the "Ed and Ty Show" were also terminated at this time. However, the person who worked as newsman on the show was not terminated; instead he was transferred to another program. Miller continued to work at station WJMK; in fact, his work there increased somewhat after his termination from station WJJD.

At the time of his discharge, Miller had worked for Respondent for about 12 years. Herny, Respondent's chief engineer since 1982, testified that he felt Miller was a competent, very talented board operator. Robinson admitted that Miller "is highly skilled at running a board, running it so the board is tight; that means there is no space between the sources." In the past when there had been a change in format or when a show was cancelled, the board operators had not been terminated; instead Respondent reassigned employees to different programs or to perform different tasks.[13]

---

disputed statement was not recently contrived just for the hearing in this case. I conclude that the sworn affidavit is a more reliable indicator of the complete conversation and, in any event, I credit Miller's testimony in this regard notwithstanding any minor prior inconsistency. Pearlman's version of these events is particularly unconvincing and is not credited.

[11] Respondent argues in its brief that Miller's version of this conversation should not be credited because the evidence shows that while Miller allegedly reported this incident to the Union, there is no evidence that the Union persued the matter by filing a grievance. I reject this inference; there are any number of reasons why a union might choose not to file a grievance on a matter such as this, including that the Board is the appropriate body to resolve the matter.

[12] Miller testified concerning union-related conversations he had with some of the new employees. However, there is no evidence that Respondent knew of this activity nor is there evidence that this activity was of such a nature that knowledge could be inferred. Thus, I do not rely on that testimony in reaching my conclusions in this case.

[13] This is based primarily on the unrebutted testimony of former program director, Price, and former announcer, Copland.

The "Ed and Ty Show" was replaced by a music program as station WJJD shifted to a mostly music format. In the past Miller had done a music program similar to the one that replaced the "Ed and Ty Show"; he also had been a music director for 2-1/2 years.[14] Also, the Monday following Miller's dismissal Respondent assigned a different board operator to work on the "G. Gordon Liddy Show"; as indicated above this is work that Miller had done in the past. In addition, Respondent continued to broadcast the "Tom Lyka Show" which required the use of a board operator. Robinson explained the failure to use Miller in one of these positions; he testified that the individuals who performed work in these positions "had stepped forward and said that they - they had asked several times before we actually made this change." He further testified that these individuals were enthusiastic and "hungry." He explained that Miller had never come forward and requested a different assignment. There is no explanation as to why Robinson would have expected Miller to request another assignment while he was working on the steady "Ed and Ty Show", nor does the evidence show that Miller was even given the opportunity to indicate an interest in other work after the "Ed and Ty Show" was cancelled; instead, Miller was fired from station WJJD. Robinson did admit that Miller possessed the skills to work on any program that Respondent was broadcasting.

In or about the fall there was a meeting of Respondent's managers at which Pearlman and Robinson were present. During the course of the meeting Pearlman said that the managers were not to hire any "weirdoes or kooks," that they should let other radio stations do that. He said that he had wasted an awful lot of time dealing with Miller.[15]

III. Analysis

The analysis set forth in *Wright Line*[16] governs the determination of whether Respondent violated Section 8(a)(3) and (1) of the Act as alleged. The Board has restated that

[14] Indeed, Pearlman specifically admitted that Miller could have performed the "combo" board operator work associated with this program.

[15] This is based on the testimony of John Herny, currently employed by Respondent as chief engineer; he has worked for Respondent and its predecessors since 1982. I credit his testimony. In addition to his truthful demeanor, I find it unlikely that someone currently employed in a position regarded by Respondent as part of management would fabricate such testimony. At the hearing, Robinson testified that he did not recall Pearlman linking Miller with terms such as "kooks and weirdos." However, after Herny had been subpoenaed to appear at this hearing by the General Counsel, Herny had a conversation with Pearlman and Robinson concerning the meeting set forth above. During this conversation, although Pearlman denied making the weirdos and kooks remark attributed to him, Robinson did concede that in fact Pearlman had used language similar to that. I also do not credit the testimony of Respondent's business manager, Vegas, who also gave testimony on this matter. At first Vegas testified that she did not recall hearing the kooks and weirdoes comment from Pearlman. Then, in response to a leading question, she replied that she never heard such a statement. Finally, when asked by me whether she had heard Pearlman use words similar to kooks and weirdos Vegas answered, "No, not to my recollection, no." This testimony conflicts with that of Robinson, who admitted that Pearlman would use language pejorative in nature like kooks and weirdos. I conclude that Vegas was presenting her testimony in a manner that would be satisfactory to Pearlman. Pearlman also presented testimony on this matter. He stated that he did not recall referring to Miller as a "kook and weirdo." I do not credit this unconvincing testimony.

[16] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

analysis as follows:

> Under Wright Line, the General Counsel must make a prima facie showing that the employee's protected union activity was a motivating factor in the decision to discharge him. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in absence of the protected union activity.[7/] An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.[8/] Furthermore, if an employer does not assert any business reason, other than one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason.[9/]
>
> [7/] NLRB v. Transportation Management Corp., 462 U.S. 393, 400 (1983).
> [8/] See GSX Corp. v. NLRB, 918 F. 2d 1351, 1357 (8th Cir. 1990) ("By assessing a legitimate reason for its decision and showing by a preponderance of the evidence that the legitimate reason would have brought about the same result even without the illegal motivation, an employer can establish an affirmative defense to the discrimination charge.")
> [9/] See Aero Metal Forms, 310 NLRB 397, 399 fn. 14 (1993).

T & J Trucking Co., 316 NLRB 771 (1995). This was further clarified in Manno Electric, 321 NLRB 278 (1996).

I now examine the record to determine whether the General Counsel has met his initial burden. The evidence establishes the elements of union activity and knowledge. Thus, Miller filed a grievance and participated in an arbitration proceeding that resulted in an award that was unfavorable to Respondent in July 1994. On June 10, 1994, Pearlman also erroneously suspected that Miller was involved in other union activity of an unspecified type. In January, 1995, Miller raised the matter of his contractual benefits with Patton. In March or April, Miller again attempted to raise the matter of his contractual benefits, this time directly with Pearlman after the intervention of Vrdolyak. I conclude all of this conduct and suspected conduct was activity protected by Section 8(a)(3) and (1) of the Act, and that Respondent had knowledge of all of this activity.

I also conclude that the evidence establishes that Respondent harbored animus against Miller because of those activities. First, with regard to the arbitration, Respondent admitted that it made certain efforts described in the August 4, 1994 memoranda in an attempt to avoid the unexpected costs resulting from the arbitration award that Miller had initiated. Thus, the award was a matter of concern to Respondent. Respondent's concern about combo board operators continued into March, when Respondent negotiated a buyout agreement with the Union covering those employees. On June 10, 1994, Pearlman directly expressed his anger at Miller for by suggesting that Miller simply quit because Pearlman erroneously suspected that Miller had engaged in union activity. In January 1995, Patton reiterated the hostility when he responded to Miller's attempt to raise his contractual benefits with the remark that Pearlman was not "in the mood" to hear about unions. Pearlman's hostility continued when he refused to initially meet with Miller to discuss the same topic and did not do so until after Vrydolak

intervened on Miller's behalf. This was despite the fact that Pearlman otherwise claimed to have an "open door" policy. When Miller did finally reach Pearlman in March or April, Pearlman again expressed his anger as shown by the language he used and the fact that he hung up the telephone on Miller rather than discuss Miller's contractual problems. This hostility continued even after Miller's termination as shown by Pearlman's connecting Miller with kooks and weirdos.[17]

The element of timing is also present, although it is not particularly strong. Although the arbitration award issued about 2 years prior to Miller's discharge, Miller's protected union activities continued persistently, if intermittently, throughout the period up until March or April. Equally important is the fact that Respondent, through Pearlman, continued to harbor animus against Miller because of Miller's protected union activity.

Finally, I note that the General Counsel has established that Miller was a long-term employee who was recognized as a good employee with no apparent work related problems. I thus conclude that the General Counsel has met his initial burden.

I now examine the record to determine whether Respondent has met its burden of showing that it would have discharged Miller even in the absence of his union activity. First, the record is clear that Respondent would have eliminated Miller from the "Ed and Ty Show" even if Miller had not engaged in union activity. It is not disputed that Vrydolak triggered the demise of that show and that Respondent had no ultimate control over his decision to leave the show. However, that does not answer the question of whether Respondent unlawfully refused to retain Miller in other positions at the station, positions which Respondent admits existed and for which Miller was qualified. It should be pointed out again that on the very day Respondent was terminating Miller it had transferred another board operator to do the G. Gordon Liddy Show, the very show that Miller had worked on in the past. I note that Respondent has not established that it has a practice of terminating board operators upon the closing of a show. To the contrary, the record affirmatively shows that such is not the practice. Nor has Respondent shown that Miller was a poor employee deserving of termination. Again, the record shows the opposite; that Miller was a long-term, fully competent employee. Rather, Respondent argues that it terminated Miller because other employees stepped forward and indicated that they had an interest in the positions; that they were "hungry." I reject that argument. First, I have found that Miller did, in fact, express an interest in other positions at his discharge meeting, but this inquiry was ignored by Respondent; its mind was already made up. In any event, based on the record as a whole I simply do not credit this unsubstantiated testimony.

At the hearing and in its brief Respondent argues that the fact that it awarded special work such as the "Ed and Ty Show" to Miller negates any finding animus or hostility by Respondent towards Miller. Upon reflection, I reject that inference. The "Ed and Ty Show" was a unique and very important show for Respondent. It became apparent that Respondent needed someone of Miller's special talents to do the show properly and keep the talent content. Pearlman was thus willing to continue to tolerate Miller under those circumstances. However, when the show ended and the special need for Miller vanished, Respondent's barely below the surface hostility resulted in Miller's termination. In connection with this argument Respondent

[17] I recognize that there is no direct connection in this comment to Miller's protected union activities. However, in the absence of any other explanation, I infer that Pearlman's personal dislike for Miller was a result of Miller's persistent union activity. *Yesterday's Children, Inc.,* 321 NLRB 766, 768 (1996), enfd. in pertinent part 115 F.3d 36 (1st. cir 1997); *Postal Service,* 315 NLRB 1176, 1178 fn. 10 (1994).

cites *De Jana Industries,* 312 NLRB 87 (1993). In dismissing the complaint in that case, the administrative law judge noted that the union activity of the alleged discriminatee had occurred 1 year prior to the alleged unlawful discharge and that during that time the respondent in that case had hired two open union supporters. The facts in this case are different; I have concluded that Miller persistently engaged in protected union activity throughout the relevant period of time and that Respondent equally persistently exhibited animus towards that activity. Thus, *De Jana* is not on point.

Respondent also argues that if there was hostility towards Miller it was harbored by Pearlman, but that it was Robinson, not Pearlman, who made the decision to terminate Miller, and, Respondent argues, there is no evidence that Robinson was hostile towards Miller. I reject that argument. First, Respondent has not presented persuasive, credible evidence that Pearlman played no direct role in the decision to terminate Miller. Also, Pearlman expressed his hostility towards Miller openly in front of Robinson. As shown by Patton's remarks described above, Respondent's management staff was well aware of Pearlman's hostility against Miller and thus it did not need to be directly told how to handle each situation in a manner that would be satisfactory to Pearlman. In connection with this argument, Respondent cites *C & S Distributors*, 321 NLRB 404 (1996). In that case the administrative law judge credited the testimony of the warehouse manager that he alone made the decision to terminate the alleged discriminatee. The administrative law judge also credited the testimony of the warehouse manager that he was unaware of significant portions of the alleged discriminatee's union activities. Those facts are unlike the facts in this case, where I have not credited the testimony that Pearlman played no role in the decision to terminate Miller and that in any event Robison was directly aware of significant portions of Miller's union activity. Also, in that case there was no evidence that the warehouse manager was aware of the hostility that other managers had towards the alleged discriminatee. Here, Robinson was certainly aware of the Pearlman's hostility towards Miller. Thus, *C & S* is not dispositive.

Finally, Respondent notes that it continues to employ Miller at station WJMK. However, this does not necessarily mean that Respondent is tolerant of Miller's union activities; it simply may show that Respondent has not yet felt it had the opportunity to completely rid itself of Miller yet. It may mean that Respondent may feel that it was able to make its point sufficiently by terminating Miller from station WJJD. In any event, I note that Miller's union activity was performed primarily as an employee of station WJJD and that is the station from which he was terminated.

Under all the circumstances, I conclude that Respondent has not met its burden of showing that it would have terminated Miller even absent his protected union activity. Rather, I conclude that Respondent initially became resentful towards Miller because of the successful arbitration award that Miller started with his grievance, and it continued to be angered by Miller's persistent efforts to continue to raise contract related matters. When the "Ed and Ty Show" ended, Respondent seized upon that event to finally get rid of Miller from station WJJD. Respondent violated Section 8(a)(3) and (1) of the Act by failing to retain Miller at positions at station WJJD for which he was qualified.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Jack Miller on July 26, 1996, because he engaged in union activity Respondent has engaged in an unfair labor practice in violation of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Miller, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall leave for the compliance stage of this proceeding the determination of the exact positions and wage rate which Miller would have received had he not been unlawfully terminated, and what impact, if any, the subsequent closing of station WJJD had on Miller's job and benefits.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Infinity Broadcasting Corporation of Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting the American Federation of Television and Radio Artists or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Miller full reinstatement to the job or jobs he would have occupied had he not been unlawfully discharged or, if that job or those jobs no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, as more fully described in the remedy section of this decision.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Make Miller whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and notify the Miller in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 1996.

[19] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 16, 1997

_____
William G. Kocol
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the American Federation of Television and Radio Artists or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jack Miller full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, as more fully described in the remedy section of the Decision in this case.

WE WILL make Jack Miller whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Jack Miller, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

INFINITY BROADCASTING CORPORATION
OF ILLINOIS d/b/a WJJD

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 200 West Adams Street, Suite 800, Chicago, Illinois 60606–5208, Telephone 312–353–7589.